PLN PROGRESSIVE LAW NETWORK

Submission to the ALRC Inquiry into Judicial Impartiality

By the Progressive Law Network, Monash University

30 June 2021

Email: pln@monashclubs.org
Website: progressivelawnetwork.org

Contributors:

Abdul Kabeer
Binari Almeida
Casey Duong
Celina Alba
Danielle Attwood
Demitri Kaminis
Ella Hadley
Joy Szeredi
Kani Balamurugan
Laura Woodbridge
Netania Lim
Piper Blake
Sandy Gamaralalage
Tristan Jamson
Vivian Lai-Tran
Zack McGuinness

Introduction

This submission takes a multifactorial approach to an issue that remains among the most pressing and pervasive in the Australian legal system. The exercise of judicial power is one of the most important yet routine expressions of state authority in the Australian constitutional landscape. Thus, the impartiality of judicial officers is a matter of highest priority to those who are most affected by the use of judicial power and from whom its ongoing authority is derived: the Australian people.[1] Whilst common law and legislative principles have sought to standardise judicial method by prescribing legal tests and processes, ultimately it is something that can never be completely secured against partiality and bias. In this respect, it is worth recalling the words of Australia's most revered jurist, the Rt Hon Sir Owen Dixon:

> It is no doubt unsafe to generalise about judicial process. For after all it is a generalisation about the work of individual men. In no field of special knowledge does one man pursue its technique or exercise its art precisely in the same as another. Certainly, the differences are marked between judicial minds at work. There is no place where the inequalities and variations of men can be seen more clearly than when the men are upon a Bench.[2]

[1] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, Preamble para 1; Robert French, 'The Constitution and the People' in Robert Pascoe (ed), *The Tuning Cymbal: Selected Papers and Speeches of Robert French* (Federation Press, 2020) 135, 145–6.
[2] Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, ed Susan Crennan and William Gummow (Federation Press, 3rd ed, 2019) 116. This quote itself demonstrates the tendency of the legal profession

In light of the infinite potential for fallibility in human decision-making, and the opaque interests which drive it, the Progressive Law Network's submission to this inquiry places emphasis on the value of judicial diversity. Diversity represents a key pathway to improving understandings of what constitutes bias and when it is present, as well as addressing public perceptions of partiality. Diversity also promises to broaden the spectrum of experiences which judicial officers may draw upon when exercising their functions.

We consider the value of judicial diversity in the full context of the Australian legal system. Thus, this submission will examine issues of public confidence, perceptions of judicial bias among marginalised communities and mechanisms for detecting and minimising bias — all important factors to consider when implementing measures aimed at achieving judicial diversity. We, as law students who will be entering the legal profession, feel that we are in a unique position to call for change. Therefore, the submission concludes with our own perspectives as progressively-minded law students, expressing individual concerns about diversity, representation, perceptions of bias, and public confidence in the judicial system.

The intrinsic value of judicial diversity

Our argument is not simply that judicial diversity decreases bias and promotes impartiality. It has proven difficult to study the actual effect of judicial diversity upon outcomes in the courts. Some studies have purported to measure a positive effect on fairness and empathy in judicial decision-making, but many studies have also been inconclusive.[3] The conclusion is that we do not have definitive proof that judicial diversity does positively affect outcomes.

Further, the ability of judges to reach different decisions based upon their background and experience is constrained by external factors.[4] The nature and norms of judicial decision-making often means that there is little scope for experience to influence decisions. Those of marginalised backgrounds may even be '[unwilling] to step out of line, and…[feel] that they must distance themselves from any notion of difference in order to establish their judicial authority and to be taken seriously by their peers and the judicial hierarchy'.[5]

---

to be 'pale, stale [and] male', as observed by then Chief Justice of the Supreme Court of Western Australia: Chief Justice Wayne Martin, 'Access to Justice in Multicultural Australia' (Speech, Cultural Diversity and the Law Conference, 13 March 2015) .

[3] See, eg, Josh Hsu, 'Asian American Judges: Identity, Their Narratives, & Diversity on the Bench' (2006) 11(1) *Asian Pacific American Law Journal* 92, 101; Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 *Current Legal Problems* 125.

[4] Hunter (n 3) 122.

[5] Ibid 127.

We argue that it is a mistake to evaluate the merits of judicial diversity in purely instrumental terms. The inherent value of judicial diversity should be given greater weight. This inherent value is strong enough for governments and courts to strive towards diversity on benches across Australia.

The judicial system is more than a means to an end. We value the rule of law for intrinsic reasons too, just as Australian culture and the legal system recognises some rights as being intrinsically valuable, such as freedom of speech,[6] and the right to life.[7] The intrinsic value of diversity in the judicial system – as well as in other branches of government – is something that the public understands and appreciates, as we will explain below.

Sir Maurice Byers, a lauded Australian lawyer, said in 1987:

> The law is an expression of the whole personality and should reflect the values that sustain human societies. The extent to which those values influence the formulation of the law varies according to the nature of the particular legal rule in question.[8]

The law is a reflection of humanity and society. Our judicial system should represent that society as closely as possible as a matter of moral value. It is immensely difficult to isolate the effect of experience, background and culture upon judicial opinions,[9] and we argue that this route is misleading. It is not necessary to first have clear evidence that judicial diversity positively affects outcomes before making the decision to institute measures in pursuit of judicial diversity. The inherent value of judicial diversity is what makes it important – the symbolism it generates in terms of legitimacy, representation, equality, and embracing difference. It positively impacts judicial impartiality in ways that cannot be measured. As Chief Justice Peter Kidd said in 2019: '*The courts are your courts. They are the people's courts, and the people are made up of a diversity of cultures.*'[10]

---

[6] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Law* (Final Report No 129, December 2015) 78.
[7] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6; Attorney-General's Deparment, 'Right to Life', *Public Sector Guidance Sheets* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-life>.
[8] Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *University of New South Wales Law Journal* 179, 182.
[9] Ervin Tankiang, 'Asian Australians and the Judiciary: Does Cultural Diversity Matter?' (2020) 30 *University of New South Wales Law Journal* Student Series 30.
[10] Chief Justice Peter Kidd, "Cultural diversity and the Law' (Speech, Australian Intercultural Society, 13 May 2019).

Public confidence

Public confidence in the judicial system is essential to effective democratic governance and the preservation of the rule of law.[11] Former Chief Justice of the High Court the Hon Murray Gleeson AC QC has indeed acknowledged that:

> The general acceptance of judicial decisions, by citizens and by governments, which is essential for peace, welfare and good government of the community, rests not upon coercion, but upon public confidence.

Judicial diversity is essential to fostering this confidence in the courts.[12] Improving diversity among judges is thus vital if the Australian legal system is to remain relevant to the diverse community it exists to protect, ensuring people can look to the judiciary as a system that serves all of society, not just a small subsection of it.[13] Public confidence in the courts relies on the institution being generally representative of the broader community, ensuring the views, values and experiences of Australia's diverse society are being represented in the decisions being made.[14] Despite this, the Australian judiciary currently fails to represent the diversity of the Australian people — particularly in terms of gender and ethnicity[15] — detracting from the courts' ability to deliver justice meaningfully, effectively and with moral authority.[16] A legal system that does not properly reflect the makeup of the community it represents will eventually lose the confidence of that community.[17] Former High Court Justice Michael McHugh has expressed support for this notion, stating extra-judicially that 'when a court is socially and culturally homogeneous, it is less likely to command public confidence in the impartiality of the institution'.[18] Indeed, it has been argued that a homogenous bench defeats the purpose of a multi-judge bench when every judicial officer shares the same

---

[11] 'Judicial Bias and Public Confidence: the Importance of Good Data', *Australian Law Reform Commission* (Web Page, 3 December 2020) <https://www.alrc.gov.au/news/importance-of-good-data/>.
[12] Jan-Marie Doogue, 'Diversity Central to Public Confidence in the Court' (2018) 924 *LawTalk* 78, <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/diversity-central-to-public-confidence-in-the-court/>.
[13] Ibid.
[14] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13'(2015) 37(2) *Sydney Law Review* 187, 211 ('Facing up to Diversity?').
[15] Kcasey McLoughlin and Joan Williams, 'An Age of Diversity: Where to Next for the Judicial Diversity Project' (2019) 9 *UNSW Law Journal Forum* 1, 3.
[16] Doogue (n 12) 78.
[17] Ibid.
[18] Justice Michael McHugh, 'Women Justices for the High Court' (Speech, Western Australia Law Society, 27 October 2004) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_27oct04.html>; Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30(2) *Sydney Law Review* 295, 300.

background and views.[19] This highlights the importance of judicial diversity in the courts; as a judiciary that better reflects the composition of our society eliminates the idea that systemic bias, and thus impartiality, operates to discriminate against certain groups.[20] The perception of a diverse judiciary is especially important within the High Court. While the public is more likely to interact with the lower courts, public perceptions of the legal system are drawn from the superior courts.[21] As such, the High Court has been the focus of efforts to ensure public confidence in the judiciary's independence and impartiality.[22] Ensuring there is representative diversity in the Australian judiciary is crucial to limiting perceptions of apprehended bias and improving public confidence in the courts.

A key moment in Australia's conversation surrounding judicial diversity was in the 1990s when numerous judges' comments in a series of cases gave rise to allegations of gender bias. These events led to the perception that the judiciary were out of touch with modern values and the broader community, with further observations being made about the male-dominated and homogenous nature of the High Court.[23] The subsequent increase in appointments of women to the bench, both in the High Court and the lower courts, can be seen as a practical consequence arising from these controversies and debates.[24] A common sense solution to an entrenched issue. We argue that we have yet to experience a similar reckoning in the context of culture, ethnicity and race. A person of colour has yet to be appointed to the High Court.

Perceptions of judicial bias among marginalised communities

This submission will consider judicial impartiality from the perspective of marginalised communities; communities that often interact the most with the legal system but do so with the least resources. The judiciary will only truly serve the community if it serves the most marginalised people in the Australian community. This section contains testimonies from Springvale Monash Legal Service (SMLS), with a focus on family law and family violence clients.[25]

Community Perceptions of Partiality

[19] Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27(3) *Melbourne University Law Review* 819, 847.
[20] Elizabeth Handsley, '"The judicial whisper goes around"': Appointment of Judicial Officers in Australia' in Kate Malleson and Peter Russel (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 122, 140 ('The judicial whisper goes around').
[21] Ibid 123.
[22] Handsley and Lynch, 'Facing up to Diversity?' (n 14) 198.
[23] Handsley, 'The judicial whisper goes around' (n 20) 129.
[24] Ibid 131.
[25] The Progressive Law Network would like to sincerely thank Springvale Monash Legal Service for sharing with us their insights into judicial impartiality based on their experiences with clients.

Perceptions of partiality are rife when it comes to any kind of decision-making. Earlier this year, discussion surrounding death of transgender Filipino woman, Mhelody Bruno, hinted at impartiality. Former RAAF corporal Rian Ross Toyer was convicted of manslaughter for Bruno's death by Judge Lerve, who was an Air Commodore on the RAAF himself. While later admitting to a sentencing error, Judge Lerve initially only sentenced Toyer to an Intensive Correction Order.[26] Inconsistent decisions regarding refugee determinations in the Federal Circuit Court have also drawn attention to the potential ideological and personal biases of judges.[27] Furthermore, it does little to help public perceptions of partiality that a significant number of Australian judges, whose interpretations of the law impact the lives of all Australians, come from elite educational backgrounds.[28]

These current community perceptions suggest that the judiciary continues to play a role in further marginalising the already marginalised.

One example of partiality, or perceived partiality, reported by SMLS includes stigma against those with a mental illness. They noted that their clients sometimes perceive judicial officers as stigmatising mental ill health when making orders to reduce time with children.

Some notable examples provided by SMLS included:

1. A family law client who had medical reports stating she was not a risk to her children and had capacity to parent, but the judicial officer still lessened the child's time with the client. The client's mental health issues were connected to the family violence the client was suffering and the family law proceedings during which she was not having time with the child. The client felt she was being punished for suffering mental health issues as a result of family violence and not seeing her child. The judicial officer implied the mother should be grateful that the father had come from not agreeing to any orders to agreeing to the independent children's lawyer's proposed orders, even though they included a reduction in time with the mother. The judicial officer implied that the fact that the mother was given any time with the child was positive given she was suffering from mental health issues and spent time in hospital.

---

[26] Isadora Bogle, 'Judge admits sentencing error and jails former RAAF corporal over girlfriend's death', *ABC News* (Web Page, 30 March 2021) <https://www.abc.net.au/news/2021-03-29/judge-forced-to-jail-rian-toyer-over-mhelody-bruno-death/100035112>.

[27] Kevyan Dorostkar, 'Judicial Review of Refugee Determinations: More by Luck than Judgement?" (Research Paper, Macquarie University, 16 March 2020) 3.

[28] Kishor Napier-Raman, 'Are Australia's courts a bastion of educational elitism', *Crikey* (Web Page, 1 November 2018) <https://www.crikey.com.au/2018/11/01/australian-courts-judges-education/>.

2. A family law client who perceived a barrier to impartiality because they could not take time off work to travel with their child to see other family members due to financial constraints. This travel was offered as an exception to an airport watchlist order. The client felt pressured by the court, ICL and the other party to take time off work to show she wanted her child to be able to travel and see family even though she could not afford it. This left the client feeling disillusioned because the judge and ICL may have been unable to relate her lived experience of not having a position that offers paid leave.

Access to Justice

Although there is yet to be further substantive research into this issue, it may be inferred from such testimonies that perceptions of judicial partiality can impact access to justice. The Judicial Council on Cultural Diversity has reported that perceptions of the judiciary from Indigenous women, whose experiences of the court has been shaped by dealings with 'police, child protection, registry staff, corrections authorities, lawyers and judicial officers' has resulted in fear that reporting violence would result in authorities removing children.[29]

SMLS has also highlighted that stigmatisation of mental health issues, time in psychiatric hospitals or assisted mental health care facilities has impacted their clients' willingness to use the court system to resolve family law disputes.

In addition, SMLS mentioned factors such as the inability to take time off work to travel with a child to see other family members when the court is pressuring them to do so, ongoing drug screens when allegations of drug abuse and parental incapacity are unfounded, and the perception that judicial officers will not and do not have time to consider breaches in an IVO matter detract from the willingness of their clients to use the formal justice system.

Perceived pressure to act in a certain way can also impact access to justice. SMLS noted that, "Family law clients often feel pressure to consent to orders to be perceived as agreeable. This can contribute to perceptions of partiality where not consenting is protective rather than obstructive but is not perceived in this way. This can make clients unwilling to use the court system and can impact their access to justice because they are so heavily pressured to consent to orders they perceive as a risk to their children".

The potential for perceptions of impartiality to impact access to justice should be considered when taking into account how perceived impartiality on Australian communities. In this instance, there is an indication that a fear of being misunderstood

[29] Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (Report, 20 March 2016) 7.

by judicial officers and a lack of understanding of the lived experiences of members of diverse communities influences the willingness of community members to use the court system.

Judicial Diversity and Public Perception

Disadvantaged communities would benefit in a diverse judiciary as a matter of public confidence. A diverse judiciary will allow those who are disadvantaged to see themselves represented by their decision-makers, thus making them more confident that such decision-makers will take their experiences into account. Lawyers from SMLS noted that:

> Clients can feel disillusioned because judges may be unable to relate to their lived experience due to their different socio-economic status, working conditions and perceived bias against their mental health.

The reality is it is impossible for decision-makers from certain backgrounds to understand the experiences of those from other backgrounds. For example, in the case of Mhelody Bruno, Judge Lerve did not appear to have the appropriate language surrounding sexual consent to appropriately make a decision. How is a colonial white courtroom to understand, for example, that an Indigeneous woman's parenting style may differ from that of a white mother? The essence of this argument is put forward by Erika Rackley and Charlie Webb. They note that, 'members of such groups have experiences and insights which would better inform judicial decision-making and law-making, and where those experiences and insights have been missing or under-appreciated (at least in part) on account of the lesser representation of such groups from the judiciary, the judiciary would be stronger and judicial-decision-making would be enhanced by greater diversity'.[30] With better representation in the court system, reflecting factors that impact lived experiences, such as class and race, the court system may be better prepared to identify the impacts of decisions on marginalised communities and, in doing so, promote public confidence and combat perceptions of partiality.

Mechanisms

Self-Disqualification

There are issues with the tests for bias themselves. However, the greater issue - and the more easily rectified – is the mechanism of self-disqualification that upholds the tests.

[30] Erika Rackley and Charlie Webb, *Debating Judicial Appointments in an Age of Diversity* (Routledge, 1st ed, 2018) 294.

The self-disqualification method essentially places judges in the 'invidious position' of judging themselves.[31] It asks judges to question their own integrity and, perhaps more crucially, their ability to do their job. Any attempt at such high-order introspection depends too heavily on the individual judge's own degree of self-awareness. The mechanism is therefore inherently flawed. The fact that this mechanism has stood in place for so long is a blight on notional ideas of procedural fairness.

The self-disqualification mechanism is also underutilised given its personal nature. In a sense, the mechanism functions as a perceived character assessment on the impugned judge rather than addressing the 'human frailty' that the test was designed to tackle.[32] So not only is the mechanism questionable when it is triggered, there is a hesitancy to even use it. It therefore fails to address the problem it was designed to ameliorate. Any continued attachment to the self-disqualification test, in the name of politeness, cost effectiveness or convenience, is archaic. It would also underestimate the force with which society is increasingly shining a harsh spotlight on institutions that reinforce outdated structures of power and privilege, as well as the inadequate procedures which allow them to continue.

Bias Training

Policymakers, civil society, businesses and the community have, to varying degrees, sought to address bias. While anti-discriminatory laws have been a step towards mitigating conscious bias, fewer strides have been made with respect to unconscious bias. The most drawn upon tool to address unconscious bias has been professional training. This has been the case for the legal profession. For example, Symmetra developed an online course which teaches 'unconscious bias fundamentals for legal practitioners'.[33] This course, marketed by the Law Council of Australia as "training that helps lawyers to uncover and address unconscious bias", can contribute towards continuing professional development requirements.[34]

A Low Ceiling

However, bias training has a low ceiling. As such, the extent to which it can effect change is limited. This is the case for several reasons:

---

[31] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 397 [185] (Callinan J).
[32] Ibid 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[33] 'Unconscious Bias Online CPD for Lawyers', *Symmetra* (Web Page) <https://symmetra.com.au/e-learning/unconscious-bias-online-cpd-for-lawyers/>.
[34] Law Council of Australia, 'Unconscious bias training now available to all Australian lawyers' (Media Release, 8 March 2017) <https://www.lawcouncil.asn.au/media/media-releases/unconscious-bias-training-now-available-to-all-australian-lawyers>.

Firstly, bias training provides a platform through which people realise their unconscious biases.[35] It allows participants to see exactly how their thinking and decision-making processes are influenced by internal biases. Beyond this though, studies have shown that bias training has little tangible impact in the long run.[36] This is reflective not only of the problematic 'tick the box' approach taken to such training, but also the deep-rooted entrenchment of unconscious biases.

Secondly, unconscious bias arises through lived experiences.[37] Bias training therefore has inherent difficulties in overcoming such lived experiences. This is especially due to the effects of lived experiences on our bias going largely unnoticed until pointed out.[38]

Finally, bias training cannot remedy the limited perspectives of a single judge or bench of judges, particularly in light of diversity concerns, as discussed above. This lies in stark contrast to juries. Advocates for juries champion their representational nature and the varying perspectives each juror comes with through their own unique lived experiences, and its beneficial flow-on effect for fairness.[39]

A final point of interest that needs more research is the extent to which repeatedly hearing similar matters, offending, victimisation etc. reinforces any bias among members of the judiciary. This was a point noted by Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*[40] with respect to personal injury litigation, with their Honours noting that it is inevitable that judges "will form views about the reliability and impartiality of some medical experts who are frequent witnesses in his or her court. In some cases, and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the evidence of a particular medical expert."[41] Arguably on the flipside, the expertise developed among the judiciary should largely overcome unconscious bias. Nonetheless, this point deserves further consideration.

<u>County Court Diversity Committee</u>

The creation of the County Court Diversity Committee is a contemporary initiative to help bridge the gap between the judiciary and the community. The Committee strives to

---

[35] Ivuoma Onyeador, Sa-Kiera Hudson and Neil Lewis, 'Moving Beyond Implicit Bias Training: Policy Insights for Increasing Organizational Diversity' (2021) 8(1) *Behavioral and Brain Sciences* 19, 20.
[36] Sue Williamson and Meraiah Foley, 'Unconscious Bias Training: The "Silver Bullet" for Gender Equity?' (2018) 77(3) *Australian Journal of Public Administration* 355, 356; Equality and Human Rights Commission, U*nconscious bias training: An assessment of the evidence for effectiveness* (Research Report No 113, March 2018), 41.
[37] Helen Turnbull, *The Illusion of Inclusion: Global Inclusion, Unconscious Bias, and the Bottom Line* (Business Expert Press, 2016) 47-53.
[38] Williamson and Foley (n 36) 356.
[39] Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 9.
[40] (1989) 167 CLR 568.
[41] Ibid 570 (Brennan, Deane and Gaudron JJ).

present the judiciary as diverse, with the aim of empowering young people from varying walks of life to pursue a career in the law. While this initiative is undoubtedly a step in the right direction, there are some limits to the Committee.

Firstly, there is a significant lack of information on the existence and functions of the Committee. A basic web search of "County Court Diversity Committee" reveals no results, and an extensive search comes up no better. Further, as law students interested in such matters, we were unaware that these initiatives existed. The only information that can be learned is that Judge Pillay and Judge Tran co-chair the Committee. However, we were only made aware of this after contacting the County Court directly. Considering the Committee aims to target young people, the lack of an online presence is a significant impediment to doing just that. That said, this shortcoming could derive from its infancy. One way to overcome this would be to partner with university law societies to advertise these programs.

Finally, although it presents the judiciary as diverse and thus a career in the judiciary as attainable, the Committee does little to overcome systemic barriers that prevent many from realising these ambitions. Such barriers include inaccessibility to education, employment and networking opportunities. The Committee comes from a unique and advantageous position that should be used to establish initiatives like sponsoring, mentoring and networking. Were the Committee to do so, it would provide a model that other courts across Victoria and Australia should follow.

Judicial Appointments Process

The judiciary's homogenous makeup has serious consequences in ensuring the confidence of our marginalised communities in the courts' decision-making. The composition of the judiciary is a product of the judicial appointments system in Australia. The appointments process, particularly at the federal level, has been the subject of criticism owing to its opaqueness and lack of genuine political accountability.[42]

Judicial appointments are made by the federal and state governments of the day.[43] There are very few official limits or requirements governments must follow in selecting an appointee. There are basic eligibility requirements and, in the case of the High Court, the requirement that the Commonwealth Attorney-General consult with their state counterparts before an appointment is made.[44] Selection is also required to be based entirely on 'merit' as the sole (publicly disclosed) criterion.[45] Aside from these few

[42] McLoughlin and Williams (n 15) 2.
[43] HP Lee, 'Appointment, discipline and removal of Judges' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27, 28.
[44] *High Court of Australia Act 1979* (Cth) s 6; Handsley, 'The judicial whisper goes around' (n 20) 123-4.
[45] Handsley and Lynch, 'Facing up to Diversity?' (n 14) 206.

considerations, the executive has what former Justice Ronald Sackville calls 'unfettered discretion' in selection.[46]

Issues arise due to the lack of definition or specificity regarding what constitutes 'merit'. Without selection criteria, it is not possible to understand the process through which an appointment is made, thus undermining public confidence in the judiciary.[47] The McClelland reforms were aimed at redressing this issue. They sought to create a more transparent appointments process and increase judicial diversity, by highlighting gender, residential location, professional experience and cultural background as targeted attributes.[48] The McClelland reforms demonstrate that transparency in the judicial appointments process and a commitment to judicial diversity can be advanced where the political will exists.[49] However, there is an inherent vulnerability in such reforms, as shown by the swift return to the old opaque process under the subsequent Coalition government.[50]

A judicial appointments committee like the UK Judicial Appointments Commission has been commonly cited as a model for Australia.[51] We argue that it is at least necessary to make public the selection criteria upon which an appointment is made. Further, it is necessary to formalise a commitment to transparency and diversity in the judicial appointments process to avoid it being subject to the whims of the politics of the day - such that the courts can truly be called independent.[52] While it has often been repeated that diversity should never surmount merit when appointing judges,[53] we argue that diversity should at least be a criterion that is considered — as diversity has merit in itself.

Our experiences

What follows are quotes from the authors of this submission, speaking from our own personal experiences as law students and members of the public.

---

[46] Justice Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (Speech, Judicial Appointments Forum Bar Association, 27 October 2006).
[47] Lee (n 43) 31.
[48] Handsley and Lynch, 'Facing up to Diversity?' (n 14) 189-190.
[49] Andrew Lynch, 'Diversity without a judicial appointments commission: The Australian experience' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 101, 104.
[50] Handsley and Lynch, 'Facing up to Diversity?' (n 14) 188.
[51] Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30(2) *Sydney Law Review* 295, 307.
[52] McLoughlin and Williams (n 15) 3.
[53] Sackville (n 46); Sir Harry Gibbs, 'The Appointment and Removal of Judges' (1987) 17(3) *Federal Law Review* 141, 145.

It is a privilege for me as a student pursuing my career in law enforcement and administrative law to have my opinion penned down regarding Judicial Impartiality. For me, the growing number of cases of assault, domestic abuse, terrorism, taxation or other property crimes makes it utterly significant for Judges to deliver their judgement free from any political or other outside influence. This posture will uphold the public respect for the courts and ensure that individual rights are protected. However, the current representation in the legal system has made me quite disappointed. Racial and Gender biasedness still prevails, and the creation of apprehended bias through interlocutory judgments have further added to the crisis. Such biasedness has deprived the public of the right of fair hearing, and they consider the judgement as unjust. The establishment of courts is not for judges or lawyers, but it is for the people that come to courts with matters that affect their families, their rights and their properties. Thus, a judge delivering a judgement based on his personal belief or due to external influence must be reminded that they are only sworn in to achieve justice between the two parties according to the rule of law and not for the fulfilment of their personal cause. Until and unless this is not ensured and implemented; my belief in the impartiality of the judiciary is still weak, and I fear that such a system might continue to erode society when I enter into the practice.

- Abdul Kabeer, Associate Member PLN

I entered law school knowing that there was a lack of diversity within the judicial sphere, however what I didn't realise was that this lack of diversity started from the very roots, that being law school itself. Although it is important that we ensure diversity within judicial benches, it is even more important that we ensure that we have diversity where it all begins. The only way to ensure diversity within law schools is by ensuring that children from all forms of backgrounds have access to equal education and opportunities. The only way to ensure equal access to education and opportunities is to have effective, compassionate and diverse governments in power who will implement the necessary policies to allow for this equal access. It is important to note that these structures and systems in our society exist intertwined; we cannot create change in the judicial sphere without also creating change in the political sphere and wider society at large. There is much work to be done however I am hopeful that someday students like myself can attend law school and feel more represented than I have during my time at law school.

- Binari Almeida, 4th Year Laws/Arts Student

*If you looked at a picture of the High Court (and many other lesser courts) now compared to at Federation, the only discernible change would be that *some* women now sit on the bench. Even as a law student, it's impossible to see how such a system could do anything except reinforce bias and prejudice. Bias will always exist. We are not striving for a judiciary without bias but it should not reinforce and unnecessarily preserve biased structures. Given the current political and social climate, change in many ways seems inevitable. A court cannot detach itself from the reality of the public's experiences and*

expect to remain relevant. The speed at which this change occurs will determine the public legitimacy of the Australian Courts. Personally, it is time to hurry up.

- Danielle Attwood, 4th Year Laws/Commerce Student

The Australian judicial system certainly exhibits merits in its pursuit of just outcomes for all. However, participating in this inquiry has further illustrated to myself the need for reform to ensure just, unbiased outcomes, and the pressing nature of this need. As a student seeking to enter a profession disappointingly still dominated by the most privileged members of society, it is of utmost importance to me that the judicial system develops a self-awareness to ensure it serves the needs of those that come before it. At the crux of performing this role is striking the delicate balance between preventing bias from influencing decision-making and accommodating for complex unconscious bias that so often disadvantages those that are already vulnerable. It is clear that this balance has not yet been met by the Australian legal system, but that by no means should suggest it should not continue to strive for it. Quite the contrary, evidence of these shortcomings should provide reason to take prompt action to improve our legal system.

- Ella Hadley, 3rd Year Laws/Arts Student

I am very grateful to have had the opportunity to pursue my interest in human rights and social justice through my law degree. However, it has ultimately led me to the conclusion that our current legal system essentially fails to serve the most vulnerable and marginalized within our communities, with a large factor to this being a lack of judicial diversity and therefore impartiality within our courts. I am of the view that, while the judiciary remains largely unrepresentative of gender, sexuality, race, class and disability, it falls far short of genuinely representing the views of the community. Those who are disproportionately affected by the law therefore have every right to feel apprehensive and distrustful of the justice system. Until it shifts away from such homogeneity, I don't have much faith in the impartiality of our judicial system. It has informed my disillusionment of the legal profession and a desire to avoid entering into it myself out of fear that I would become complicit in this lack of diversity as well.

- Joy Szeredi, 6th Year Laws/Arts Student

As a woman of colour and law student seeking a career in the legal industry, judicial representation and impartiality is important to me. Although over the decades there have been strides to change, it is discouraging to see how gradual and limited this has been. Australia prides itself on its diversity and multiculturalism, so this should be reflected on all levels. This highlights the need for a judiciary to represent the multi-faceted experiences, concerns and values of all Australians when deciding cases. Not only will this protect already vulnerable and disadvantaged groups, but it will also encourage younger generations to be interested in Law with the solid understanding that their unique perspective is indeed valuable. As long as the judiciary remains biased to some extent, it

will not be able to adequately protect the diverse Australian society. Judicial impartiality is something that we must strive towards, and I have hope that more progress will be made when it is time for me and my peers to be admitted to practice.

- Kani Balamurugan, 3rd Year Law/Biomedical Science Student

My view on the issues this inquiry is to investigate are heavily influenced by my position as both a law student and a member of the community. I am concerned about bias in the legal system, the public perception of bias, and the role that judicial diversity (or the lack of it) plays in this complex problem. It is as someone who is looking to go into the legal profession that I have an interest in ensuring that Australia's legal system is free of judicial bias. I also am acutely aware that the system works for us as members of the public and should therefore be as representative of the wider Australian community as possible. Growing up, it was difficult to imagine a future in any career that didn't appear to welcome me, or people like me. I think it is important to make those who don't fit the current mould of a member of the legal profession feel welcome, and like they will be treated fairly – on either side of the bench. Diversity of experience plays a significant, though immeasurable, role in judicial decision-making and the perception of bias. I hope that when I enter the profession, it will be a little more diverse and open to all.

- Laura Woodbridge, 5th Year Laws/Arts Student

My interest in the Judicial Impartiality inquiry is based on my past experiences with the legal system as a law student, as a woman of colour from an immigrant family, and having volunteered at Community Legal Centres. I am particularly concerned about how judicial impartiality affects marginalised communities, because judicial bias can affect the legal outcomes of people who are already vulnerable. Vulnerable groups often have an existing distrust in authority and the legal system, and I am concerned that the coagulation of power in a judiciary that is not diverse can, over time, influence their perception and confidence in the judicial system. A judiciary that is diverse and represents the community at all levels affects the public perception of the judiciary. However, representation is only part of the picture. There are broader systemic issues, which influence judicial and unconscious biases. People from marginalised communities who perceive that there has been judicial bias are likely to become further disillusioned with the judicial system, undermining its authority. This also affects any future contact with the judicial system, even making it less likely that people reach out for legal assistance until their legal problem is extremely serious. People in the judicial system may be viewed as being unable to relate to the lived experiences of people from marginalised communities. This entrenches distrust and fear of the judicial system, and is deepened by people's past experiences, which are often trauma related. From a broader view, judicial impartiality is imperative to the idea that the judiciary system be independent, representative, and part of the idea of equal participation in democracy, all of which are guaranteed to anyone who comes into contact with the Australian legal system. The legal system necessitates a high

level of public trust in a judge's integrity. When that trust is broken, it takes a long time to rebuild that trust, and to ensure that fairness and impartiality is perceived.

- Netania Lim, 6th Year Laws/Arts Student

I am very concerned about the prevalence of judicial bias in our current legal system, particularly that stemming from the appalling lack of diversity reflected across our judiciary. As a female-identifying, lesbian law student looking to enter the legal profession, I have found the lack of representation in the judiciary extremely disheartening, contributing to my disillusionment in the judicial system as a sanctuary of unbiased truth and justice. Having experienced the damaging effects of this lack of representation on my own perception of, and trust in, the legal system, I recognise the critical importance of ensuring diversity in the judiciary to guarantee the experiences of Australians are not being judged under the inherent bias of ignorance. The Australian legal system is meant to represent and protect the rights of every citizen, but it cannot possibly do that without proper diversity of experience being reflected in the judgments being upheld by our courts. Diverse representation is vital to achieving judicial impartiality, and I sincerely hope that my own future in the legal profession will be accompanied by a significant change in the standard of diversity required across the Australian judiciary.

- Piper Blake, 4th Year Laws/Global Studies Student

Both as a law student and as a person from a culturally and linguistically diverse background, I am concerned with the lack of judicial diversity and stemming from this, the lack of understanding of the experiences of members of diverse groups. Australia is a multicultural country, but these multicultural values and experiences are not represented as such in the legal field. From my perspective, a lack of judicial diversity and understanding predisposes a greater propensity towards bias, especially where the reasoning might stem from certain stereotypes and views. How can those from diverse backgrounds interacting with the legal system be confident that their unique perspective is understood? How can we have public confidence in a system that may fail to understand diverse perspectives?

- Sandy Gamaralalage, 5th Year Laws/Arts Student

As a student seeking a career in the law, bias and perceptions of bias among the judiciary and the legal system more broadly is a significant concern. Parts of our community face systemic barriers day in and day out. Of which, the legal system has historically and presently been a major contributor towards. Yet very little has been done to rectify this. The consequences of such pronounced inaction are alarming. Namely, it continues a cycle of perpetuating systemic barriers, marginalising parts of our community and further entrenching animosity in the legal system. To pave the way forward to a legal system that is and is perceived to be just and fair for everyone, we must diversify our judiciary. After all, our legal system must be a source of justice for everyone, rather than a continuing source of injustice.

- Zack McGuinness, 4th Year Laws/Arts Student